

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

) MDL No. 1917

) Case No. C-07-5944-SC

This Order Relates To:

) ORDER ADOPTING SPECIAL
) MASTER'S REPORT AND
) RECOMMENDATION REGARDING
) SUBPOENA

APPLICATION FOR JUDICIAL
ASSISTANCE FOR THE ISSUANCE OF
SUBPOENA PURSUANT TO 28 U.S.C.
§ 1782 TO OBTAIN DISCOVERY FOR
USE IN A FOREIGN PROCEEDING

I. INTRODUCTION

On October 22, 2012, the Special Master in the above-captioned matter (the "MDL") issued his Report and Recommendation regarding a subpoena by Sharp Corporation ("Sharp"). ECF No. 1415 ("R&R"). Underlying the R&R are Defendants' Motion to Quash, ECF No. 1327 ("Mot. to Quash") and Sharp's Motion to Compel, ECF No. 1340 ("Mot. to Compel"). The MDL defendants relevant to the instant matter ("Defendants"), too numerous to list here, appear at Mot. to Quash 1 n.1. Now before the Court is the joint motion of Defendants and non-party Saveri & Saveri, Inc. ("Saveri") to adopt the R&R. The matter is fully briefed and appropriate for resolution without oral argument. ECF No. 1426 ("Mot. to Adopt R&R"); ECF No. 1430 ("Obj. to R&R"). For the reasons explained below, the Court ADOPTS the

1 R&R, GRANTS Defendants' Motion to Quash, and DENIES Sharp's Motion
2 to Compel.¹

3 **II. BACKGROUND**

4 Petitioner Sharp Corporation ("Sharp") is a manufacturer of
5 electronics products, currently pursuing an antitrust case similar
6 to the MDL in South Korea (the "Korean Litigation"). R&R at 2.
7 Defendants are a group of electronics producers, all of whom are
8 defendants in the MDL and some of whom are also defendants in the
9 Korean Litigation. Id. at 3. Non-party Saveri is class counsel
10 for the Direct Purchaser Plaintiffs ("DPP(s)"), a group of
11 plaintiffs involved in the MDL. Id. at 2.

12 The Korean Litigation concerns an alleged antitrust conspiracy
13 that involves only Korean cathode ray tube manufacturers and
14 suppliers, and only sales taking place outside the United States.
15 Sharp has not yet pursued discovery in Korean courts for the Korean
16 Litigation. R&R at 2-4. Instead it first requested a subpoena
17 from this Court to obtain documents from Saveri under 28 U.S.C. §
18 1782, which permits district courts to order production of
19 documents or other materials to foreign tribunals. Id. at 2.
20 Sharp's subpoena demands that Saveri produce all discovery related
21 to the DPP action of the MDL, because Sharp believes information
22 relevant to the Korean Litigation could be found in those
23 materials.² Id. Defendants and Saveri both objected to the

24 ¹ Because the Court decides this motion without considering Sharp's
25 request for extra briefing, Sharp's motion for leave to file a
26 reply to Saveri's opposition to Sharp's objection, ECF No. 1456, is
DENIED AS MOOT.

27 ² Sharp has since narrowed the scope of the subpoena to include
28 only documents produced by MDL Defendants in the United States, and
to exclude documents produced by plaintiffs or third parties. Mot.
to Compel at 2-3. Saveri maintains that that production of these

1 subpoena, Defendants moved to quash it, Sharp moved to compel
2 compliance, and the Special Master heard their arguments on
3 September 20, 2012. Id. at 1-2. The Special Master recommended
4 that Defendants' motion to quash be granted and that Sharp's motion
5 to compel be denied, because he deemed § 1782 assistance
6 unwarranted. Id. at 1-6. Saveri and Defendants now ask the Court
7 to adopt the R&R. Mot. to Adopt R&R at 1. Sharp objects, arguing
8 that the Special Master made critical legal and factual errors and
9 therefore abused his discretion. Obj. to R&R at 1.

10 11 **III. LEGAL STANDARDS**

12 **A. Standard of Review for the R&R**

13 The Court reviews the Special Master's factual findings for
14 clear error, his legal conclusions de novo, and his procedural
15 decisions for abuse of discretion. Fed. R. Civ. P. 53(f)(3)-(4);
16 ECF No. 302 ("Order Appointing Special Master") ¶ 18 (parties
17 stipulated to "clear error" standard for factual findings).

18 **B. Section 1782**

19 Title 28, Section 1782(a) of the United States Code states in
20 relevant part that "[a] district court of the district in which a
21 person resides or is found may order him to give his testimony or
22 statement or to produce a document or other thing for use in a
23 proceeding in a foreign or international tribunal." The Court's
24 decision to grant or deny this assistance is discretionary. Intel
25 Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257 (2004).

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27 documents would be burdensome and time-consuming for its small
28 staff. ECF No. 1353 ("Opp. to Mot. to Compel").

1 The Supreme Court provided four factors to aid district courts
2 in deciding whether to grant § 1782 applications: (1) whether the
3 person from whom discovery is sought is a participant in the
4 foreign proceeding; (2) the nature of the foreign tribunal, the
5 character of the foreign proceedings, and the receptivity of the
6 foreign government to receiving United States federal-court
7 judicial assistance; (3) whether the § 1782 request conceals an
8 attempt to circumvent foreign proof-gathering restrictions or other
9 policies of that country or the United States; and (4) whether the
10 requests are unduly intrusive or burdensome. Id. at 264-65.

11 The Supreme Court also settled an earlier division among lower
12 courts, holding that § 1782 includes no "foreign-discoverability
13 rule," meaning that the statute does not bar district courts from
14 ordering production of documents simply because they would be
15 unobtainable if located in the foreign jurisdiction. Id. at 259-
16 63.

17 18 **IV. DISCUSSION**

19 The parties do not dispute that Sharp is statutorily permitted
20 to seek discovery assistance under § 1782. Their dispute concerns
21 whether Sharp adequately showed, under the Intel factors, that its
22 request is warranted. Sharp argues that the Special Master's
23 recommendations under the four Intel factors are based on factual
24 and legal errors, thereby vitiating his discretion.³

25 ³ Sharp also makes a very general claim that the Special Master's
26 taking note of Sharp's decisions to bring a case in Korea and to
27 opt out of the DPP class of the MDL is evidence of a pervasive
28 factual error in the R&R that affects each Intel factor. Sharp
goes no further with that point in its argument sections, leaving
this allegation vague. See Objection to R&R at 2. In any event,
the Court finds no reversible error on this point.

1 **A. The First Intel Factor**

2 The first Intel factor states that "when the person from whom
3 discovery is sought is a participant in the foreign proceeding
4 . . . the need for § 1782(a) aid is generally not as apparent as it
5 ordinarily is when evidence is sought from a nonparticipant in the
6 matter arising abroad." 542 U.S. at 264. The Supreme Court's
7 concern here was that evidence from nonparticipants might be
8 unobtainable in the foreign jurisdiction absent § 1782 aid. Id.

9 Sharp argues that the Special Master erred in finding that the
10 first factor weighed against § 1782 assistance, because Saveri is
11 not a party to either litigation. Obj. to R&R at 9. The Special
12 Master found that, despite Saveri's non-party status, it is obvious
13 that Sharp actually seeks information about Defendants, some of
14 whom are subject to Korean discovery rules as parties to the Korean
15 Litigation. R&R at 4. The Special Master further found that Sharp
16 has discovery options available to it in Korea, despite its
17 protestations that it does not, the critical point being that Sharp
18 has not availed itself of them. R&R at 4. None of these
19 conclusions is mistaken or otherwise in error. The Court finds
20 that the Special Master made no reversible errors under the first
21 Intel factor.

22 **B. The Second Intel Factor**

23 The second Intel factor states that a district court "may take
24 into account the nature of the foreign tribunal, the character of
25 the proceedings underway abroad, and the receptivity of the foreign
26 government or the court or agency abroad to U.S. federal-court
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1 judicial assistance." 542 U.S. at 264.

2 First, Sharp argues that the Special Master improperly imposed
3 a foreign-discoverability rule when considering this factor.
4 Objection to R&R at 10-11. The Court finds that the Special Master
5 did not do so. The Supreme Court described such a rule in Intel as
6 being an interpretation of § 1782 that would bar ordering
7 production of documents on the basis of their not being obtainable
8 in discovery in the foreign jurisdiction. See 542 U.S. at 259-261.
9 However, factors like comity among nations and parity among parties
10 can be touchstones in this analysis. See id. at 263-65. The
11 Special Master did not reject Sharp's discovery request because he
12 thought it would be barred in Korea. He rejected it because he
13 found that Sharp had not shown that its request was warranted, and
14 other relevant factors like comity and parity also weighed against
15 it. See R&R at 4. This conclusion was not in error.

16 Second, Sharp argues that the Special Master incorrectly
17 assigned Sharp the burden of proof to demonstrate the Korean
18 court's receptivity to United States discovery materials. Obj. to
19 R&R at 11. Sharp cites a series of cases that it claims "[make]
20 clear that the burden is on the party opposing the § 1782 discovery
21 to demonstrate a lack of receptivity in the foreign court." Id.⁴
22 That claim is not so clear. None of the cases Sharp cites are
23 binding on this Court. Further, none of these cases precisely

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25 ⁴ Specifically, Sharp cites Euromepa S.A. v. R. Esmerian, Inc., 51
26 F.3d 1095, 1102 (2d Cir. 1995); In re Application of Apple, Inc.,
27 No. MISC 12-80013, 2012 WL 1570043, *2 (N.D. Cal. May 2, 2012); In
28 re Gushlak, No. 11-MC-218, 2011 WL 3651268, at *3 (E.D.N.Y. Aug.
17, 2011); In re Republic of Ecuador, No. C-10-80225, 2011 WL
736868, *7 (N.D. Cal. Feb. 22, 2011); and Cryolife v. Tenaxis
Medical, Inc., No. C-08-5124, 2009 WL 88348, *3 (N.D. Cal. Jan. 13,
2009).

1 states which party bears the burden on receptivity. In any event,
2 the Special Master's legal conclusions on who bears the burden to
3 show receptivity were not central to his decision. Having weighed
4 each party's arguments and the facts before him, the Special Master
5 simply concluded that the Korean court's receptivity did not
6 warrant § 1782 assistance. The Court finds that the Special Master
7 made no reversible errors under the second Intel factor.

8 **C. The Third Intel Factor**

9 The third Intel factor states that "a district court could
10 consider whether the § 1782(a) request conceals an attempt to
11 circumvent foreign proof-gathering restrictions or other policies
12 of a foreign country or the United States." 542 U.S. at 265.
13 Courts need not determine that an applicant has exhausted its
14 discovery attempts abroad. See Euromepa S.A. v. R. Esmerian, Inc.,
15 51 F.3d 1095, 1098 (2d Cir. 1995). However, a perception that an
16 applicant has "side-stepped" less-than-favorable discovery rules by
17 resorting immediately to § 1782 can be a factor in a court's
18 analysis. See, e.g., In re Application of Caratube Int'l Oil Co.,
19 LLP, 730 F. Supp. 2d 101, 107-8 (D.D.C. 2010).

20 Sharp again argues that the Special Master applied a foreign-
21 discoverability rule here. Obj. to R&R at 13. For the reasons
22 discussed above, the Court disagrees. See supra, Section IV.B.
23 The Court also finds the Seventh Circuit decision cited by Sharp
24 inapposite. Id. at 13-14 (citing Heraeus Kulzer, GmbH v. Biomet,
25 Inc., 633 F.3d 591 (7th Cir. 2011)). Unlike this case, the Seventh
26 Circuit decision involved a foreign law specifically barring
27 discovery of a particular type of document. See Heraeus, 633 F.3d
28 at 597-98. Here, the Special Master found that Sharp had side-

1 stepped less-than-favorable discovery rules by resorting
2 immediately to § 1782, see Caratube, 730 F. Supp. 2d at 107-8, when
3 Korean discovery was available. R&R at 4-5. The Special Master
4 made no reversible errors under the third Intel factor.

5 **D. The Fourth Intel Factor**

6 The fourth Intel factor encourages district courts to consider
7 the burdensomeness of § 1782 requests, stating that "unduly
8 intrusive or burdensome requests may be rejected or trimmed." 542
9 U.S. at 265. Sharp argues that the Special Master made three
10 errors here. Obj. to R&R at 15-17.

11 First, Sharp claims that the Special Master erred in
12 questioning whether case law supported the breadth of Sharp's
13 request and speculating about the history and scope of § 1782. Id.
14 at 15-16. The Court finds that the Special Master appropriately
15 evaluated the facts per the Intel's guidance that district courts
16 should consider the burdens and intrusiveness of foreign discovery
17 requests. Intel, 542 U.S. at 265. His reasoning was not in error.

18 Second, Sharp claims that the Special Master's decision to
19 reject Sharp's discovery request instead of simply trimming it was
20 in error. Obj. to R&R at 17. But Intel says only that unduly
21 intrusive or burdensome requests "may be" rejected or trimmed. 542
22 U.S. at 265. They do not have to be.

23 Third, Sharp claims the Special Master erred in concluding
24 that the burden on Saveri to gather and compile the electronic
25 discovery record would be unacceptable. Obj. to R&R at 16-17. The
26 Special Master found that the burden on Saveri's small team plus
27 the collateral burdens and intrusions on defendants in the Korean
28 Litigation weighed against Sharp on this factor, regardless of the

1 facts that the record was maintained on an electronic server and
2 Sharp was willing to assist with production. R&R at 5-6. This is
3 an appropriate conclusion. Therefore the Special Master made no
4 reversible errors under the fourth Intel factor.

5 **E. Additional Factors**

6 Sharp also claims that the Special Master erred in considering
7 policy considerations "outside the scope of the statute or the
8 Intel factors," like whether Sharp was forum-shopping or whether
9 the decision to grant a subpoena might encourage other litigants
10 foreign actions to take aim at class counsel instead of pursuing
11 discovery abroad. See Objection to R&R at 18-20. To the extent
12 that any of these factors were considered separately, the Intel
13 factors are neither exclusive nor mandatory. They are guidelines,
14 and the Special Master did not err in considering additional
15 factors he thought appropriate.

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1 **V. CONCLUSION**

2 The Special Master made no factual or legal errors in
3 considering the Intel factors. Accordingly, the Court does not
4 find that the Special Master abused his discretion in issuing the
5 R&R. Thus, the Court GRANTS Defendants' and Saveri & Saveri,
6 Inc.'s Motion to Adopt the Special Master's Report and
7 Recommendation, APPROVES AND ADOPTS the Special Master's Report and
8 Recommendation, GRANTS Defendants' Motion to Quash, DENIES Sharp
9 Corporation's Motion to Compel, and DENIES Sharp Corporation's
10 Motion for Leave to Reply as MOOT.

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12 IT IS SO ORDERED.

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14 Dated: January 17, 2013

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16 UNITED STATES DISTRICT JUDGE
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